IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHN OAKLEAF

Plaintiff,[1]

v. **No. 15-cv-0220 RB/SMV**

FNU FRAWNER,
and FNU IBRAHIM,

Defendants.

PLAINTIFF'S UNOPPOSED MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

COMES NOW Plaintiff Julie Oakleaf, by and through her counsel of record, the American Civil Liberties Union of New Mexico ("ACLU"), Elisabeth V. Bechtold and Maria M. Sanchez, and hereby respectfully requests that Plaintiff be given leave to file a second amended complaint (*See* Plaintiff's proposed Second Amended Complaint, attached hereto as Exhibit 1). Plaintiff's counsel contacted counsel for Defendants and determined that Defendants do not oppose this Motion. As grounds for this request, Plaintiff states as follows:

1. On February 13, 2015, while incarcerated at the Otero County Prison Facility, Plaintiff filed a *pro se* handwritten complaint for civil rights violations in this Court. *See* Complaint [Doc. No. 1].

2. Pursuant to an Order from this Court requesting additional factual allegations concerning the named Defendants, Plaintiff filed a *pro se* handwritten amended complaint on July 7, 2015. *See* Amended Complaint [Doc. No. 2].

3. Plaintiff's counsel entered their appearances in this case on October 12, 2016.

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[1] Plaintiff identifies as female and prefers the name Julie Marie Oakleaf. [Doc. 1]. Accordingly, the parties will refer to Plaintiff as "she" or "her."

4. On December 13, 2016, the Court held a telephonic Rule 16 Scheduling Conference, during which Plaintiff's counsel advised the Court and Defendants' counsel of their intention to file a second amended complaint in this case in order to replace Plaintiff's handwritten *pro se* complaint with one prepared by her attorneys.

5. With respect to the filing of a second amended complaint, the parties agreed on a deadline of February 1, 2017.

6. On December 13, 2016, the Court issued a Scheduling Order reflecting the parties' agreement concerning the filing of a second amended complaint. Specifically, the Scheduling Order imposed a deadline of February 1, 2017, for Plaintiff to "join additional parties and amend the pleadings (in compliance with the requirements of Fed. R. Civ. 15(a))." *See* Scheduling Order [Doc. No. 56].

7. Per the Scheduling Order, Plaintiff filed a Second Amended Complaint on February 1, 2017. *See* Second Amended Complaint [Doc. No. 65]. Prior to filing the Second Amended Complaint, Plaintiff's counsel inadvertently neglected to request opposing counsel's written consent or the Court's leave per the requirements of Rule 15(a)(2). This was a procedural oversight and in no way reflected an intentional effort on the part of Plaintiff's counsel to circumvent the Federal Rules of Civil Procedure.

8. On February 15, 2017, Defendants filed a Motion to Strike Plaintiff's Second Amended Complaint on the grounds of Plaintiff's counsel's procedural oversight with respect to Rule 15(a)(2). *See* Motion to Strike [Doc. 67].

9. Due to this procedural oversight, Plaintiff's counsel is contemporaneously filing a Notice of Dismissal of the Second Amended Complaint.

10. The decision to allow amendments of the pleadings lies within the sound discretion of this Court. *See Clayton v. Tansy*, 26 F.3d 980, 982 (10th Cir.1993). Leave to amend "shall be freely given when justice so requires." *See* Fed. R. Civ. P. 15(a); *Burleson v. ENMR-Plateau Telephone Co-op*, 2005 WL 3664299, * 1 (D.NM. 2005).

11. Refusing leave to amend is generally only warranted upon a showing of one or more of the following: (1) undue delay; (2) undue prejudice to the opposing party; (3) bad faith or dilatory motive; (4) failure to cure deficiencies by amendments previously allowed; or (5) futility of amendment. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365–66 (10th Cir.1993) (internal citations, quotation marks, and bracket omitted). Regarding futility, amendments should be denied only if they assert clearly frivolous claims or defenses. *Maya v. General Motors Corp.*, 935 F.Supp. 1245 (D.NM. 1996) (citing *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 695 (8th Cir.1981)).

12. Additionally, it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. Indeed, the Federal Rules of Civil Procedure "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Cooper v. Amer. Auto Ins. Co.*, 978 F.2d. 602, 608 (10th Cir. 1992) (quoting *Foman v. Davis*, 371 U.S. 178, 182-83 (1962)).

13. None of the above factors weigh in favor of denying the present Motion. First, there is no undue delay, as discovery is it in its initial stages and Plaintiff's counsel sought leave to amend shortly after realizing the procedural oversight associated with the filing of the Second Amended Complaint. Second, permitting amendment will not result in undue prejudice to the opposing party as Defendants' counsel knew of Plaintiff's counsel's intention to replace

Plaintiff's handwritten *pro se* amended complaint with one prepared by her attorneys. Third, there is no bad faith or dilatory motive underlying the present Motion as Plaintiff's counsel is simply endeavoring to further clarify and formalize her claims in this case. The procedural oversight with respect to the February 1, 2017 filing was inadvertent and did not result from an effort to circumvent the applicable rules. *See*, e.g., *Youell v. Russell*, 2007 WL 709041 (D.N.M. 2007) (granting plaintiff's request to amend its complaint because, *inter alia*, the proposed amendments would "further clarify and formalize the case"). Fourth, this is not a situation in which Plaintiff failed to cure any deficiencies in her First Amended Complaint. Fifth, the Second Amended Complaint does not contain clearly frivolous claims and, therefore, futility is not a concern.

14. Finally, Plaintiff's procedural oversight with respect to filing the Second Amended Complaint should not be decisive to the outcome of this case, and permitting Plaintiff to amend her complaint will facilitate a proper decision on the merits.

15. Based on the foregoing, justice requires that Plaintiff, formerly *pro se* and currently represented by counsel, be allowed the opportunity to amend her complaint.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order allowing Plaintiff to file a second amended complaint.

DATE: March 1, 2017

Respectfully submitted,

/s/ Elisabeth V. Bechtold

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing notice was served upon all counsel of record via the CM/ECF system on this 1st day of March, 2017.

/s/ Elisabeth V. Bechtold
Elisabeth V. Bechtold